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/s/ David Gerger  
David Gerger

# 08-11090

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH JUDICIAL CIRCUIT

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**UNITED STATES OF AMERICA,**

Plaintiff-Appellee,

v.

**RUBEN BOHUCHOT AND FRANKIE LOYANG WONG,**

Defendants-Appellants.

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On Appeal from the United States District Court  
for the Northern District of Texas  
Dallas Division  
District Court Number 3:07-CR-167-L

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**BRIEF FOR THE UNITED STATES**

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### **RECOMMENDATION ON ORAL ARGUMENT**

The government recommends against oral argument because it would not materially aid the Court in its disposition of this matter.

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**BRIEF FOR THE UNITED STATES**

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**STATEMENT OF JURISDICTION**

Ruben Bohuchot and Frankie Loyang Wong appeal from the judgments of conviction and sentences imposed by the United States District Court for the Northern District of Texas. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Bohuchot filed a timely notice of appeal on November

17, 2008, while Wong's was filed on November 21, 2008. (Bohuchot - R3/599; Wong - R3/628.)<sup>1</sup>

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### **STATEMENT OF THE ISSUES**

1. Whether the government's proof and the district court's jury instructions constructively amended the indictment by allowing conviction on an unindicted theory.

2. Whether the evidence was sufficient to establish appellants' guilt on the bribery counts as alleged in the indictment?

3. Whether the government impermissibly commented on Wong's right to forego testifying, by allegedly arguing that there were others who testified while Wong was just "sitting there" during trial.

4. Whether the court's jury instructions impermissibly lowered *mens rea* for the money laundering conspiracy from "intentional" to "knowing."

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<sup>1</sup> The court reporter submitted a set of transcripts for each appellant. The volumes are not all numbered the same for a particular date of testimony, and, even when they are, the pagination across volumes is not the same. The government has tried to make its citations to the record as clear as possible. Unfortunately, there are citations across the two sets of record – mainly because counsel for the government had completed most of her review of the testimony in anticipation of drafting a statement of facts before realizing that she was using Bohuchot's set, even though Wong drafted the primary brief for appellants. For pleadings citations, the number immediately following "R" is the volume designation, with the number after the "/" referring to the page number within that volume. For record of testimony citations, the number immediately following "V" is the handwritten designation on the Bohuchot volume cover, with the number after the "/" referring to the page number within that volume. Unless otherwise noted, citations are to the Bohuchot record.

5. Whether, in calculating the “value” of the bribe for sentencing purposes, the district court improperly used the “total cost of ownership” for two boats that Bohuchot used extensively, but were owned by Wong and his partners.

6. Whether the district court erred in its finding that multiple bribes occurred, rather than finding “related payments” for a “single action.”

### **STATEMENT OF THE CASE**

Bohuchot and Wong were charged in a multi-count indictment, along with William Coleman, with offenses relating to the award of contracts by the El Paso Independent School District (DISD) resulting from bribery.<sup>2</sup> (Wong - R1/26-42.) Both Bohuchot and Wong were charged in count one with a conspiracy involving the bribes, as proscribed by 18 U.S.C. § 371. (Wong - R1/26-42.) Counts two through nine charged the two with substantive bribery offenses, in violation of 18 U.S.C. §§ 666(a)(1)(B), (a)(2), and 2. (Wong - R1/43-46.) Count ten alleged a conspiracy involving Bohuchot and Wong to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). (Wong - R1/47-53.) Bohuchot was charged in count 13 with obstructing an official proceeding, a violation of 18 U.S.C. § 1512(c), and with two counts of making a false statement on a tax return in

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<sup>2</sup> Coleman pled guilty to attempting to influence a grand jury, a violation of 18 U.S.C. § 1504, and testified for the government. (V266/2939-3109; GE251.)

14 and 15, violations of 26 U.S.C. § 7206(1). (Wong - R1/56-57.) The jury found Bohuchot and Wong guilty of the charges. (Wong - R3/523-525; V272/3478-3408.)

The district court varied substantially from the sentencing guideline range and ordered a 132-month term of imprisonment for Bohuchot.<sup>3</sup> (Bohuchot Sentencing/3650.) The court likewise varied from the guideline range to impose a 120-month term of imprisonment for Wong.<sup>4</sup> (Wong Sentencing/3385.) The court imposed a three-year term of supervised release as to each appellant. (Wong Sentencing/3386; Bohuchot Sentencing/3652.) Wong was ordered to pay a special assessment of \$1,000, while Bohuchot was ordered to pay \$1,300. (Wong Sentencing/3387; Bohuchot Sentencing/3653.) No fine and no restitution was ordered for either. (Wong Sentencing/3386, 3392; Bohuchot Sentencing/3651.)<sup>5</sup>

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<sup>3</sup> With a total offense level of 40 and a criminal history category of I, Bohuchot faced an imprisonment range of 292 to 365 months. (Bohuchot Sentencing/3628.) The aggregate sentence was composed of 60 months on count one, 120 months on counts two through nine, 120 months on count 10, 120 months on count 12, and 12 months on counts 14 and 15, with the terms in counts one through ten, and 13 running concurrently with each other, and consecutively with counts 14 and 15. (Bohuchot3/605; Bohuchot Sentencing/3650-3651.)

<sup>4</sup> With a total offense level of 36 and a criminal history category of I, Wong faced an imprisonment range of 188 to 235 months. (Wong Sentencing/3364.) The term of imprisonment imposed by the court was composed of 60 months on count one, 120 months on counts two through nine, and 120 months on count 10, with all of the counts running concurrently. (Wong - 3/622; Wong Sentencing/3385-3386.)

<sup>5</sup> There was also a forfeiture allegation in the indictment. (Wong - R1/62-63; Bohuchot - R1/58-59.) Based on jury findings, the court ordered forfeiture in the amount of \$979,220.90.

## **STATEMENT OF FACTS**

### **The Players**

At the times alleged in the indictment, Ruben Bohuchot was the chief technology officer for the Dallas Independent School District (DISD), with responsibilities spanning both the administrative and instructional technology needs of the district.<sup>6</sup> (V257/2036, 2038; GE7.) As part of his job, Bohuchot recommended solutions to meet the technology needs of the district and managed the procurement of technology contracts for the district. (V257/2048-2048, 2057-2058.) Frankie L. Wong was president and co-owner, along with Jack Ing and Alan Chin, of Microsystem Engineering (MSE), a technology reseller and service provider, with its corporate office in Houston and a satellite office in Dallas.<sup>7</sup> (V244/149, 151; V246/727; V259/146; V261/2516-2517.) William Coleman was employed at DISD as deputy superintendent and chief operating officer from August 30, 1999, through September 15, 2000. (V266/2941, 2943; GE8-9.) He and Bohuchot had previously worked in the San Francisco school district and were

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(Wong - R3/536-537, 618-619; Bohuchot - R3/500-501, 589-590.)

<sup>6</sup> The government introduced evidence showing that DISD received far in excess of \$10,000 from the federal government for each fiscal year between 2003 and 2005. (V257/2026-2028, 2031-2032; GE10.)

<sup>7</sup> MSE was also known as Microsystem Enterprises. (V244/147-148.)

friends. (V266/2941-2942, 2945, 2952.) After leaving DISD, Coleman began working as a consultant, eventually creating a company he called Kenbridge Consulting Services, Inc. (V266/2940, 2985; GE206.)

### The Game

Bohuchot, in exchange for cash and other benefits, including the extensive use of two luxury boats, provided early access to information that enabled Wong and MSE to profit from the Seats Management and E-Rate Year Six contracts let by DISD. (Testimony of Blair Thomas (V244/145-311; V260/2359-2503), Garrett Goeters (V261/2511-2606; V245/320-383), Dan Tingley (V245/445-612), Bernard Cabatingan (V264/2612-2834), William Coleman (V266/2939-3109).) Under the Seats Management Program (SMP), a customer, such as a school district, made per-seat payments for the use of desktop computers, purchasing the right to use the vendor's computers and resources, while the vendor continued to own and be responsible for the upkeep of the computers. (V261/2518.) DISD awarded a Seats Management contract worth approximately \$18 million dollars over six years to Hewlett-Packard (HP), with MSE as a subcontractor.<sup>8</sup> (V258/2269-2270, 2272; V265/2885; GE/15-16.) MSE received at least

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<sup>8</sup> Compaq, which merged with HP, was actually awarded the contract. (V258/2270; GE14.)

\$4,674,303 for its participation on the Seats Management contract. (V265/2844-2847; GE86.) Coleman worked as a consultant with MSE to assist the company in developing a SMP with DISD beginning in March or April of 2002, and was paid \$256,850.00. (V265/2855-2856; V266/2960-2965.)

The E-Rate program was designed by the federal government to provide affordable telecommunication services, Internet access, and internal connections for schools and libraries, and was administered by the Universal Service Administrative Company (USAC). (V257/2024-2025.) To implement the program, schools and libraries hired vendors to provide the necessary network electronics, e-mail system, network system, network cabling, and web access portal. (V258/2278.) DISD awarded the E-Rate Year Six contract, which was worth over \$115,000,000, to a consortium of companies led by MSE. (V258/2296; GE25.) More than \$35 million dollars were paid to MSE on behalf of the consortium between May of 2003 and July of 2005. (V265/2848, 2892-2894; GE87.)

### The Rules

For some of its needs, DISD used a Request for Proposals (RFP) to inform potential bidders of the scope, location, and other requirements for projects. (V257/2067-2068; V258/2161.) Vendors, in turn, worked up sealed responses to

the RFPs that were required to be submitted by a specified due date to the DISD purchasing department. (V257/2068, 2072.) RFPs are developed by the DISD purchasing department after the relevant user department notifies the purchasing department that it wants to procure goods or service that fall within certain parameters. (V257/2165.) The user department provides specifications for the goods or services to the purchasing department, which prepares the RFP, after adding some boilerplate language. (V257/2165.) The purchasing department then sends the draft RFP back to the user department for approval. (V257/2068-2069; V258/2161.)

Once approved, a RFP is released publicly so that all vendors have an equal opportunity in responding. (V258/2161-2162, 2170.) To insure fairness in the bidding process, the DISD purchasing department has developed and implemented procedures to prevent one vendor from having an advantage over the another. (V257/2075-2076.) For example, vendors are not told that a RFP is coming out because doing so would give those vendors an advantage in starting to write their responses. (V258/2170.) DISD does not contact vendors even after a RFP is published. (V258/2171.) If a vendor has a question about a published RFP and contacts DISD, any answer provided to the vendor is posted on the DISD website so that it is available to all prospective vendors. (V258/2178.)



If a vendor provided help in drafting the specifications in a RFP, then the vendor was not permitted to participate in that RFP because they would have an unfair advantage. (V258/2307.) That is because the vendor might have written the specifications towards their process, services, or products. (V258/2307.)

Once the responses to the RFP are received, they are opened by the purchasing department. (V257/2072.) An evaluation committee, composed of three to nine members, and usually selected by the user department, then scores the responses, based on predetermined criteria provided to each committee member, with the scores determining the winner. (V257/2073-2075; V258/2169, 2273, 2285.) The decision about how many points will be assigned to an evaluation criteria comes from the user department – for the SMP and E-Rate contracts, that would be the technology department. (V258/2286.) Both the SMP and E-Rate programs were initiated by way of RFPs, with Bohuchot being very involved in the development process for both. (V257/2048-2049; V258/2168.) Bohuchot also negotiated both contracts for DISD. (V258/2271, 2298-2299.)

#### How the Rules Were Broken

In approximately October of 2001, Bohuchot expressed to Blair Thomas, Director of Sales and Operations for MSE in Dallas, his interest in obtaining computers at DISD through a Seats Management contract. (V244/147-149, 177,

179; V260/2401.) Thomas immediately told Wong about the opportunity.

(V244/178.)

Bohuchot also advised Coleman somewhere in this time period that he was very interested in a Seats Management program. (V266/2959-2963.) Sometime in early 2002, Bohuchot told Coleman that he was working on a RFP for Seats Management.<sup>9</sup> (V266/2963.)

Over several months, Bohuchot provided non-public information to MSE about the upcoming Seats Management RFP, which Thomas testified “gave us time to prepare for the response and critically work with our partners that would be working with us and allow us to work out the best program possible to help win the opportunity.” (V244/187.) The information provided by Bohuchot to MSE included the RFP’s requirement that the companies placing a bid be a billion-dollar revenue company. (V244/184.) Thus, several months prior to the SMP RFP being made public on May 7, 2002, MSE, which was not qualified to participate in the SMP on its own because it was not a billion-dollar company,

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<sup>9</sup> Coleman testified that Wong approached him in early 2002, after Coleman had previously raised the concept with him, about Coleman helping him put together a SMP proposal because he believed that DISD would eventually issue an RFP directed to a SMP. (V266/2960-2964.) Coleman got the impression from both Wong and Bohuchot that it was very likely that a SMP RFP would issue from DISD. (V266/965.) He began working for Wong in March or April of 2002. (V266/2965.) Coleman also testified that it would be an advantage for a vendor to know specifics about when a RFP was coming out. (V266/2965, 3088-3090.)

entered into a partnership with HP in anticipation of the upcoming RFP. (V244/178, 184; V258/2175.) This partnership was created months before other companies knew that they would need such a partnership, and was vital to MSE's ability to profit from the SMP contract.

Bohuchot had multiple conversations with MSE and HP representatives to discuss and explain how this program would work, including Thomas, Wong, and Garrett Goeters of HP.<sup>10</sup> (V244/177-181, 180-181.) Thomas testified that he had about ten meetings with Bohuchot between October of 2001 and May of 2002. (V244/179-180.) It was clear to Thomas that Bohuchot was providing information so that MSE could win the bid. (V244/186.) For example, on one occasion Bohuchot was insistent that Thomas understand how the program would work so that he (Thomas) could explain it to Wong. (V244/185-186.) Thomas also testified that, during this same time period, Wong had discussions with Bohuchot about the SMP, both with and without Thomas being present. (V244/180-181.)

Other information provided by Bohuchot included that the RFP would have a request for "value-adds," and the importance that would be placed on them.

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<sup>10</sup> Thomas also testified that Bohuchot did not provide very much information on the specifications that would be included in the RFP, but that hardware was not an important part of the SMP. (V244/183.) It is the service and support structure that makes the SMP unique and valuable. (V244/183.)

(V244/181-183.) A “value-add” is a sweetener; it is something that a vendor adds to a contract that is above and beyond the subject of the RFP.<sup>11</sup> (V244/181.) Although he did not tell Thomas how many points would be assigned to the value-adds, Bohuchot indicated that they would be weighted equally or more heavily with other RFP requirements. (V244/182.) Bohuchot suggested what would be good value-adds for HP/MSE, *e.g.*, sponsorship of the DISD golf tournament on a committed level over the life of the contract. (V244/182.) Thomas took the information provided by Bohuchot back to MSE and HP to help them prepare a bid. (V244/185; V260/2409-2411.) Thomas also testified that he worked with HP on their response to the upcoming RFP beginning in November or December of 2001. (V260/2400-2401.) Although the information provided by Bohuchot did not guarantee a win, it gave them an advantage. (V260/2470-2471.)

Thomas also recounted a conversation with Bohuchot when they were out golfing one day. (V244/172-175.) Bohuchot wanted to know “what was in it for him,” considering all of the business MSE was doing with DISD. *Id.* Thomas, who testified that he was stunned by the question, told Bohuchot that that was a

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<sup>11</sup> Value-adds were not typically used at DISD because they are somewhat objective. (V244/100-101; V247-1042.)

Frankie Wong question. (V244/175.) Thomas believed that the conversation occurred before the SMP program. (V244/175-176.)

Both Thomas and Coleman testified that Bohuchot showed them a copy of the RFP before it was issued on May 7th.<sup>12</sup> (V244/190-194; V266/2968-2971.) Early in May of 2002, Wong, Bohuchot, Coleman, their wives, Thomas, and his girlfriend traveled to Key West. (V244/188.) While riding in a van from Miami to Key West, Thomas was handed the SMP RFP. (V244/191-193.) He was able to review it quickly and saw some of the specifications. (V244/192.) When he asked if he could keep it for the evening, Bohuchot told him that “it needed to go back into the briefcase.” (V244/192, 194.) Wong also looked at the document. (V244/193.) They openly discussed some of the information in the RFP, which reflected the previous conversations they had had, and no one acted surprised when the document was shown. (V244/193-194.) By the time Thomas saw the RFP, he “believe[d] we were highly qualified to bid on the RFP with our partners in place and ready to prepare our response.” (V244/196.)

Coleman testified that, while they were all in the van, Bohuchot picked up an envelope, held it up, and said, “Look what I’ve got.” (V266/2970.) When Coleman asked him what it was, Bohuchot pulled something half-way out of the

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<sup>12</sup> The RFP was ready internally on May 1, 2002. (V266/3094; GE11.)

envelope and said, “Look what I’ve got.” (V266/2970.) Seeing something with a DISD logo that he believed said “RFP,” Coleman was surprised and very angry because he knew that showing an advance copy of a RFP was a violation of DISD policy that would taint the process. (V266/2970-2972.) When he again asked Bohuchot, “What is that?”, Bohuchot just smiled. (V266/2970.) Coleman could not remember whether anyone else commented or whether Bohuchot showed the document to anyone else; Coleman shut down and began paying attention to his wife. (V266/2971.) He later confronted Bohuchot when they were alone. (V266/2972.) He asked Bohuchot, “What the ‘F’ are you doing? Why are you showing that to me?” (V266/2972.) When Bohuchot laughed and smiled, without contradicting Coleman, Coleman interpreted that to mean that it was a RFP just as he had thought. (V266/2972, 3080.) Coleman believed that Bohuchot “was trying to help with my effort in working on Mr. Wong’s proposal.” (V266/2972.)

Goeters, an HP account executive who worked exclusively with technology customers within school districts, testified that Bohuchot was his main contact at DISD. (V261/2512-2513.) Sometime in 2001, Goeters sent some information to Bohuchot about a SMP, including details about an SMP HP had done with the Richardson Independent School District. (V261/2518-2519.) Also in 2001, either Thomas or Wong approached HP about partnering with MSE on a SMP.

(V261/2519-2520.) Goeters and Bohuchot had multiple conversations about the SMP between 2001 and when the RFP went public, with and without MSE representatives being present. (V261/2522-2523, 2528; V245/346.) The two men discussed specific information about the RFP, including value-adds such as a golf tournament sponsorship, a technology outreach program, and program specifications and service beyond that set forth in the RFP.<sup>13</sup> (V261/2525-2526.)

Despite the fact that he knew he should not have been getting advance information about the RFP, Goeters testified that the information provided by Bohuchot helped HP/MSE prepare their bid; they had more time to respond and were better qualified to respond. (V261/2529.) The government introduced an e-mail sent by Goeters, dated Friday, May 3, 2002, to several HP staffers asking for their help in responding to the upcoming RFP. (V261/2531; GE79.) Goeters testified that several of the specifics in the e-mail (1000 servers, 2500 printers per year, help desk service, break fix service, installation services, program management MACS, and value-adds) were gleaned from conversations with Bohuchot and Wong. (V261/2534, 2536; GE79.) In particular, Goeters included information in the e-mail that 30 points would be assigned to the value adds in the RFP. (V261/2535; GE79.) Getting the advance information was especially

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<sup>13</sup> Bohuchot was in charge of the DISD golf tournament. (V261/2526.)

important with respect to the SMP RFD, which required a larger, more complex response. (V245/350.)

After the SMP RFD was released, several other companies approached HP about partnering with HP. (V261/2527.) HP preferred to work with MSE because they knew of Bohuchot's preference for the company. (V261/2527-2528.)

And the Prize Goes to ...

Although there was evidence that Wong generously provided "gifts" to members of the DISD staff and others, such as tickets to sporting events, drinks, meals, banquets, and golf tournaments, the breadth of "generosity" to Bohuchot, in addition to the surreptitious manner in which they were conveyed, belie appellants' claims that the benefits Bohuchot received from Wong were simply part and parcel of their friendship. Daniel Tingley testified extensively about the two boats that formed part of the benefit provided to Bohuchot. (V245/450-451.) Although Tingley technically captained the boats for Wong for a little over four years, the upshot of his testimony was that Bohuchot ran the show with respect to the boats, while Wong through Statewide Marketing and MSE paid for everything.<sup>14</sup> (V245/457-499, 528-533, 564-569, 573.)

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<sup>14</sup> Statewide Marketing, which received almost all of its funds from MSE (over \$2 million dollars), was a shell company that did no work and had no employees other than those associated with the boats. (V259/145-146; V265/2575-2576, 2578.) The rest of its funding



Tingley first met Bohuchot sometime in 2000, when he was introduced by a relative. (V245/450-451.) About two years later, Bohuchot called Tingley and asked whether, for a fee, Tingley would help him purchase a 46-foot sport fishing boat, which was located in Galveston, Texas. (V245/451, 456, 466, 557.) Bohuchot had already picked out the boat and wanted Tingley's help in the actual purchase process, including having it inspected. (V245/452-453.) When Tingley told Bohuchot that he needed some money to begin the process, Bohuchot made the arrangements for the money. (V245/453.) Tingley's wife picked up a check from MSE to cover the start-up costs. (V245/453.) After completing the inspection, Tingley reported back to Bohuchot that the boat was worth the money being asked by the owner. (V245/454.) A few days later, Bohuchot called and told Tingley they had bought it.<sup>15</sup> (V245/455.) Bohuchot subsequently asked Tingley to have breakfast with him and a friend to discuss Tingley working for him as captain of the boat. (V245/455.) When he went to a café located in a small

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came from Analytical Computer Service, another consortium member. (V265/2575.) Statewide Marketing was used to provide entertainment, such as stadium seats and the two boats. (V265/2576.) The government introduced Statewide invoices directed to MSE and to Southwest Analytical Computer Services for non-existent marketing and consulting services. (V265/2576-2577; GE78.)

<sup>15</sup> The purchase price for the boat was \$305,000. (V245/461; GE74.)